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No. 06-40

In The Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

RESPONDENT CITY OF BERKELEY'S BRIEF IN OPPOSITION

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RESPONDENT CITY OF BERKELEY'S RESTATEMENT OF THE QUESTIONS PRESENTED

Respondent City of Berkeley ("City") restates the questions presented by Petitioner for two reasons. First, Petitioner failed to alert the Court to a threshold jurisdictional flaw in Petitioner's standing to recover damages allegedly suffered by a sea-scouting program of the Boy Scouts of America ("BSA"), an absent party, when the City terminated BSA's subsidy. Second, Petitioner's questions presented included misstatements or omissions of material fact. Respondent City therefore reformulates the questions presented as described next.

1. As a threshold jurisdictional matter, does Evans, an adult scout leader, have standing to recover damages allegedly suffered by BSA, who is not a party, when the City terminated its subsidy of BSA's sea-scouting program because of BSA's exclusionary policies against gays and atheists?

2. May a state or local government require a private provider of *publicly-funded services to the public*, to provide reasonable written assurances that the program will be open to all members of the public who are eligible for the publicly-funded services, without discrimination, or does such a funding condition violate the First Amendment?

3. Is a state or local government's funding requirement – that subsidized public services will be open to all members of the public, without discrimination – violate the Equal Protection rights of vendors who fail to provide such written assurances because of their private exclusionary beliefs?

LIST OF PARTIES

Individual youth participants in BSA's sea-scouting program in Berkeley and Eugene Evans, who is an adult scout leader and the skipper of one of the BSA chartered boats, originally filed petitioner Evans' complaint against the City of Berkeley seeking damages suffered by BSA. *BSA itself is not a party.* No individual youth participants in the BSA program *are parties in this Court*, even though they were parties in the California Supreme Court. Petitioner Evans, an adult scout leader, is the sole petitioner in this Court.

TABLE OF CONTENTS

	Page
RESPONDENT CITY OF BERKELEY'S RESTATEMENT OF THE QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
RESPONDENT CITY OF BERKELEY'S BRIEF IN OPPOSITION	1
JURISDICTION	1
STATEMENT OF THE CASE	1
1. BSA Was The Sole Recipient Of City Subsidy From 1945 to 1997	2
2. The March 1997 Marina Resolution Was Adopted To Respond To Requests By Two Additional Groups Who Sought City Subsidies For Their Programs	3
3. BSA's Sea-Scouting Program Is The Only Program That Failed To Provide Requested Written Assurances Of Non-Discrimination; The Other Three Subsidized Programs Complied	4
4. Evans' Counsel Conceded That The Berkeley Sea-Scouting Program And BSA Are One And The Same With Respect To Policies Concerning Discrimination Against Gays And Atheists	5

TABLE OF CONTENTS – Continued

Page

5. The City Council Rejected The Waterfront Commission's Recommendation To Continue The Subsidy As Long As The Discriminatory Policies Were Changed Within A One-Year Grace Period 5

6. Evans Shares The City's Viewpoint In Its Nondiscrimination Policy Favoring Inclusion Of Gays And Atheists; He Alleges That The Berkeley Program Has Historically Included Both Gays And Atheists 7

7. Evans Seeks To Recover Damages Allegedly Suffered By The BSA, A Non-Party 7

8. All Causes Of Action Except Claimed Violations Of Equal Protection And The First Amendment Have Been Finally Resolved Against Evans; He Is The Only Petitioner In The United States Supreme Court 8

REASONS WHY THE PETITION SHOULD BE DENIED 9

I. PETITIONER HAS NO STANDING TO RECOVER DAMAGES SUFFERED BY BSA, AN ABSENT PARTY; THIS COURT LACKS JURISDICTION UNDER ARTICLE III 9

A. A Petitioner Seeking Certiorari Review By The United States Supreme Court Has The Burden Of Establishing That He Has Article III Standing To Obtain The Relief Sought In His Complaint 9

TABLE OF CONTENTS – Continued

Page

B. Petitioner Evans Must Suffer An "Injury In Fact" Caused By The City's Policy Which Is Redressed By The Requested Relief – He May Not Pursue Damages Suffered By The BSA, An Absent Party ... 11

C. Petitioner Evans Does Not Have Standing To Recover Damages Suffered By BSA ... 12

II. PETITIONER MISSTATES THE FACTS ... 15

A. The California Supreme Court's Procedural Determinations As To Judicially Noticed Facts Deemed True Are Not Subject to Review By The United States Supreme Court ... 15

B. Petitioner Makes Material Misstatements ... 16

1. Petitioner Repeatedly Differentiates Between The Sea Scouts And BSA Even Though He Conceded To The California Supreme Court That They Are One And The Same ... 17

2. The City Exercised Its Discretionary Budgetary Authority To Fund Particular Programs To Provide Services To The Public; It Did Not Create A "Generally Available Benefit" ... 17

3. The BSA Sea-Scouting Program Was The Only Subsidy Applicant That Failed To Comply With The Marina Resolution ... 18

TABLE OF CONTENTS – Continued

Page

4. The Waterfront Commission's Recommendation To Continue The Subsidy Was Only Advisory To The City Council, Who Rejected It 19

III. THE CALIFORNIA SUPREME COURT THOROUGHLY AND CORRECTLY ANALYZED AND APPLIED EACH CASE CITED BY EVANS; IT REJECTED EVANS' CLAIMS BASED ON THE FACTS 20

A. The California Supreme Court's Decision Is Consistent With This Court's Decision On The Right of Expressive Association And Viewpoint Discrimination; The City's Policy Supports and Does Not Burden Evans' Viewpoint Since He Favors The Inclusion of Gays and Atheists In Sea-Scouting 21

B. The California Supreme Court's Decision Is Consistent With This Court's Decisions Concerning Conditions On Government-Funding – The City Has Wide Latitude To Tailor Its Publicly-Funded Programs 23

C. Evans' Remaining Attacks On The California Supreme Court Decision Turn On Factual Misstatements 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004) 24

Bender v. Williamsport Area School District, 475 U.S. 531 (1985) 12, 14

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 22

Cammarano v. United States, 358 U.S. 498 (1959) 25

DaimlerChrysler Corp. v. Cuno, ___ U.S. ___, 126 S.Ct. 1854 (2006) 9, 10, 27

Dickerson v. United States, 530 U.S. 438 (2000) 15, 16

Doremus v. Board of Education, 342 U.S. 429 (1952) 10

Erie R. Co. v. Williams, 233 U.S. 685 (1914) 12

Grove City College v. Bell, 465 U.S. 555 (1984) 24, 25

Harris v. Rivera, 454 U.S. 339 (1991) 15

Legal Services Corporation v. Velasquez, 531 U.S. 533 (2001) 25

Locke v. Davy, 540 U.S. 712 (2004) 24

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 12

Mu'Min v. Virginia, 500 U.S. 415 (1991) 15

Princeton University v. Schimd, 455 U.S. 100 (1982) 10

National Endowment of the Arts v. Finley, 524 U.S. 569 (1998) 28

Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983) 25

Rumsfeld v. Forum for Academic & Institutional Rights, ___ U.S. ___, 126 S.Ct. 1297 (2006) 23, 26

TABLE OF AUTHORITIES – Continued

Page

Rust v. Sullivan, 500 U.S. 173 (1991) 26

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 25

Sanchez-Llamas v. Oregon, 2006 WL 1749600 (June 28, 2006) 16

Sierra Club v. Morton, 405 U.S. 727 (1971) 11

Smith v. Phillips, 455 U.S. 209 (1982) 15, 16

Speiser v. Randall, 357 U.S. 513 (1958) 26

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 11, 13

Virginian R. Co. v. System Federation, 300 U.S. 515 (1937) 12

United States v. Am. Library Ass'n, 539 U.S. 194 (2003) 24

Warth v. Seldin, 422 U.S. 490 (1975) 12, 14

STATE CASES:

Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866 (1981) 26

Curran v. Mount Diablo Silverado Council, 17 Cal. 4th 670 (1998) 3, 12

Gantmann v. Union Pacific Insurance Company, 232 Cal.App.3d 1560 (1991) 13

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION:

Article I, Section 8, cl. 1 26

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV ..... *passim*

FEDERAL STATUTES AND RULES:

10 U.S.C. § 983 26

20 U.S.C. § 7905 21

28 U.S.C. § 1257(a) 15

42 U.S.C. § 5309 21

Supreme Court Rule 10 ..... 9, 30

STATE STATUTES:

California Corp. Code § 7710 13

RESPONDENT CITY OF BERKELEY'S BRIEF IN OPPOSITION

Respondent City of Berkeley (hereafter "City") respectfully prays that petitioner Evan's Petition for a Writ of Certiorari to review the unanimous decision of the California Supreme Court be denied.

JURISDICTION

Evans lacks standing to recover damages suffered by BSA, an absent party. Thus, this case does not present an Article III case or controversy and this Court lacks jurisdiction to decide it.

STATEMENT OF THE CASE

Petitioner Evans' statement of the case is misleading both as to its inclusions and material omissions. Besides, he fails to append sufficient material parts of the record to enable this Court to properly consider the Petition. Accordingly, Respondent City's Brief in Opposition sets forth an independent and complete recitation of the material facts and cites to documents contained both in the Appendix to the Petition and the Appendix to the City's Brief In Opposition. The documents in the Appendix to the City's Brief are alphabetized sequentially to succeed the appendices in the Petition and thus begin with the letter E.

In sum, Evans, an adult participant in BSA's sea-scouting program, seeks in his First Amended Complaint to recover damages from the City of Berkeley, which were allegedly suffered by the Boy Scouts of America and its

regional corporate arm, the Mount Diablo Silverado Council (referred to here collectively as "BSA"). These damages were allegedly caused by the City's 1998 termination of its funding subsidy of BSA's sea-scouting program at the Berkeley Marina. The City's withdrawal of the subsidy was prompted by BSA's refusal to provide reasonable written assurances that the City-subsidized program for the public would not discriminate against participants in the program on listed bases, including sexual orientation and religion. BSA advised the City that BSA's programs, such as the sea-scouting program, are controlled by BSA's exclusionary policies against gays and atheists.

Petitioner's counsel conceded that this was the case to the California Supreme Court. These facts are described in greater detail next.

1. BSA Was The Sole Recipient Of City Subsidy From 1945 to 1997

In 1945, the Berkeley City Council adopted a resolution that granted BSA use of one berth and mooring facilities for seven boats free of charge at the Berkeley Marina. The resolution was appended as Exhibit C to Petitioner's First Amended Complaint (hereafter "FAC") App. E-1. The subsidy was terminable on 30 days written notice. *Id.* In 1989, the City Council rescinded that resolution and replaced it with a new resolution granting the Boy Scouts of America, Mt. Diablo Council, a fee waiver for six berths, two dry storage spaces and one dock locker at the Berkeley Marina for its sea scouting program. Exhibit D to FAC, App. F-1-2.

The Mount Diablo Silverado Council is "a California nonprofit corporation chartered by the National Council of

the Boy Scouts of America to oversee, facilitate and administer the provisions of an effective scouting program within the council's geographic area." *Curran v. Mount Diablo Silverado Council*, 17 Cal. 4th 670, 678, 952 P.2d 218, 223, 72 Cal.Rptr. 410, 415 (1998). The FAC at paragraph 101 describes the sea-scouting program as a "subdivision of BSA." App. D-42.

Petitioner's counsel conceded in both the trial court and the California Supreme Court that the Berkeley sea-scouting program is controlled by BSA's policies. App. A-20. Such a factual concession is binding on Petitioner under California law. App. A-21. Petitioner admitted that those policies include compliance with BSA's exclusionary policies against atheists and gays. App. A-3 n.1, 20.

2. The March 1997 Marina Resolution Was Adopted To Respond to Requests By Two Additional Groups Who Sought City Subsidies For Their Programs

Until March 1997, BSA was the only group receiving a berthing subsidy at the Berkeley Marina. At the time, four free berths were allocated to the sea-scouting program, valued at an annual cost of $21,900. The Nautilus Society, which provided educational programs, and a private individual who took children on San Francisco Bay trips, wanted to avail themselves of similar but more modest benefits. When these additional groups sought the subsidy, the City Manager recommended that the Council adopt a resolution to guide it in considering these requests. App. G. The Council adopted the Marina Resolution. App. H. The California Supreme Court took judicial notice, under California law, of the undisputed legislative history of the City Council action challenged in this case. App. A-3-6.

Under the Marina Resolution, community organizations seeking a berthing subsidy had to: 1) provide a beneficial public service that outweighed revenue lost by waiver of the berthing fee; 2) operate a regular and ongoing activity; 3) create a presence in the Marina that is of great service to the community; and 4) not duplicate services provided by a private business operator.

The Marina Resolution also recited the Marina's policy of prohibiting discrimination in Marina facilities on the basis of race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition. Organizations applying for free berths were required to demonstrate their compliance with these policies through written membership policies and practices, mission statements, recruitment strategy and outreach to underrepresented populations. App. H.

3. BSA's Sea-Scouting Program Is the Only Program That Failed To Provide Requested Written Assurances of Non-Discrimination; The Other Three Subsidized Programs Complied

The FAC alleges that three other organizations received free berth space at the Marina: the Nautilus Institute, the Cal Sailing Club and the Berkeley Yacht Club. FAC ¶ 46, App. D-21. Petitioner's counsel admitted to the trial court that the other organizations "were able to say that they would not discriminate on the basis of sexual orientation" while "the Sea Scouts because of their association with the Boy Scouts could not say . . . we do not discriminate on the basis of sexual orientation." Reporter's Transcript, April 30, 2001, p. 29 4-7, 16-22, App. I-2. As the

California Supreme Court noted in its opinion, admissions of counsel during these proceedings are binding and deemed admitted facts under California law. *See* App. A-20-21.

4. Evans' Counsel Conceded That The Berkeley Sea-Scouting Program And BSA Are One And The Same With Respect To Policies Concerning Discrimination Against Gays And Atheists

Petitioner's counsel conceded before the California Supreme that the Sea Scouts and BSA were "one and the same" with respect to discrimination. "We are bound by what the Boy Scouts tell us we have to do." The Court then stated: "We accept these concessions by plaintiffs as establishing, even as against any contrary allegation or implication of the complaint, that the Sea Scouts could not truthfully state, consistent with the limitations imposed on them, that they would not in the future discriminate against openly gay or atheist participants." App. A-20. For this reason they instead supplied a letter dated April 8, 1998 which represented only that their policy was not to inquire about sexual orientation and not discriminate on the basis of religious preference rather than religion. Petition p. 4.

5. The City Council Rejected The Waterfront Commission's Recommendation To Continue The BSA Subsidy As Long As The Discriminatory Policies Were Changed Within A One-Year Grace Period

The Waterfront Commission recommended to the City Council that the BSA subsidy be continued for a one-year

grace period as long as the sea scouts agreed to convince BSA to allow them to bring their policies into conformance with the City's Marina nondiscrimination policy within that grace period. App. K. The City Council, however, *rejected the Waterfront Commission's recommendation.* App. A-4-5, 18-19.

At its May 5, 1998 meeting, the Council received a report from the City Manager recommending that the Council deny the free berths based upon an attached City Attorney's opinion concluding that the provision of free berths would violate a City ordinance which forbade discrimination on the basis of sexual orientation in City-funded programs and services and the Council's Marina Resolution. App. J. The City Attorney's opinion reported to the City Council that BSA's counsel had advised the City Attorney that the Berkeley sea-scouting program could not deviate from BSA's policies, including the required exclusion of atheists or avowedly gay persons. App. J-2-3. Petitioner's counsel conceded these facts in the California Supreme Court as well. App. A-20.

The City Council thereupon voted to deny the free berths at the Berkeley Marina "due to the Boy Scouts of America's discriminatory policies against gays and atheists." App. A-23-24; App. K. Pursuant to the terms of the 1989 resolution granting BSA the free berths, the City then terminated *BSA's subsidy* for the sea-scouting program. App. A-23-24; App. F-2.

6. Evans Shares The City's Viewpoint In Its Nondiscrimination Policy Favoring Inclusion of Gays and Atheists; He Alleges That The Berkeley Program Has Historically Included Both Gays And Atheists

The California Supreme Court noted that the plaintiffs before the California Supreme Court, including Evans "disavow both in their complaint and in their briefs in [the California Supreme Court] any desire to discriminate on the basis of sexual orientation or religion. They therefore cannot, and do not, claim that Berkeley, by requiring them to refrain from such discrimination is restricting their membership for purposes of expressive association." App. A-17. Evans' complaint alleged that the Berkeley sea-scouting program has historically included gays and atheists. App. D-22.

7. Evans Seeks To Recover Damages Allegedly Suffered By BSA, A Non Party

The City rescinded the berthing subsidy to BSA for six berths, two dry storage spaces and a locker. The subsidy was issued to BSA Mount Diablo Council under the Council's 1989 resolution, not to Evans. *See* App. F. Evans, who is only a scout leader, purports to recover *damages to BSA's sea scouting program* when the City subsidy to BSA was terminated, as the City now describes.

The FAC seeks: 1) the rental value of six berths, two day storage spaces and one dock locker from June 1998 for the next 100 years; 2) rental fees of $433 per month for one Sea Scout vessel from June 1998 for the next 100 years with adjustments for inflation; 3) general and

compensatory damages including lost wages, telephone expenses, photocopying expenses and other out of pocket losses, cancellation of various Sea Scouting Activities due to loss of funds, general impairment of Sea Scouting activities due to loss of funds, loss of members and related emotional distress. D-53-54.

8. All Causes of Action Except Claimed Violations of Equal Protection and The First Amendment Have Been Finally Resolved Against Evans; He is the Only Petitioner In The United States Supreme Court

The FAC alleged multiple causes of action for breach of implied, oral and express contracts, estoppel, implied covenant of good faith and fair dealing and various claimed violations of state statutes. The only cause of action asserting a violation of federal or state constitutional rights (along with statutory theories) was the fifth cause of action. All causes of action sought to recover the damages described above to *the BSA program*, not to any individual participant.

The trial court and California Court of Appeal dismissed all the causes of action. *See* App. B and C. Petitioners only sought review in the California Supreme Court on claims under the First Amendment and Equal Protection clause and their California Constitutional counterparts. The California Supreme Court affirmed the dismissal of these claims. App. A. The instant petition then ensued on behalf of a single Petitioner, Evans, who raises only First Amendment and Equal Protection claims. Petition p. (i).

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because: 1) Petitioner Evans lacks standing to recover damages incurred by BSA, an absent party, and thus this Court lacks jurisdiction to decide a matter which fails to present an Article III case or controversy; 2) the California Supreme Court decided this case on the *facts*, which Petitioner misrepresents, and thus certiorari is not appropriate under Rule 10 to challenge facts determined by a State Supreme Court over which this Court lacks supervisory power; and 3) The California Supreme Court considered, correctly enunciated and carefully applied all the applicable decisions of this Court and the circuit courts reading them in the light most broadly protective of First Amendment and Equal Protection rights. It correctly rejected Petitioner's claim on its facts and not on any misapplication of federal law. Thus, there is simply no basis under Rule 10 for certiorari review. The City addresses each of these arguments in turn below.

I. PETITIONER HAS NO STANDING TO RECOVER DAMAGES SUFFERED BY BSA, AN ABSENT PARTY; THIS COURT LACKS JURISDICTION UNDER ARTICLE III

A. A Petitioner Seeking Certiorari Review By The United States Supreme Court Has The Burden Of Establishing That He Has Article III Standing To Obtain The Relief Sought In His Complaint

Just this year, this Court reiterated "We have 'an obligation to assure ourselves' of litigants' **standing** under **Article III**." *DaimlerChrysler Corp. v. Cuno*, ___ U.S. ___,

126 S.Ct. 1854, 1863 (2006). "Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects '"the proper – and properly limited – role of the courts in a democratic society,"' [citations omitted]. If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1860-61. The Petitioner carries the burden of establishing his standing. *See id.* at 1861.

This jurisdictional limitation applies with equal force, even if a case originated in a state court, and the state's highest court decided the federal issue on its merits. *Doremus v. Board of Education*, 342 U.S. 429, 434-435 (1952).

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

See also Princeton University v. Schimd, 455 U.S. 100, 103 (1982). "That Princeton had standing in state court does not determine the power of this Court to consider the issue. Any determination of who has standing to assert constitutional rights is a federal question to be decided by the Court itself." *Id.*

B. Petitioner Evans Must Suffer An "Injury in Fact" Caused By The City's Policy Which is Redressed By The Requested Relief Sought In His Complaint – He May Not Pursue Damages Suffered By BSA, An Absent Party

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998), the Court summarized the three elements that form the "irreducible constitutional minimum of standing" under Article III of the Constitution to sue in federal court:

> First and foremost, there must be alleged (and ultimately proved) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" [Citations omitted.] Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. [Citations omitted.] And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury. [Citations omitted.] This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. [Citations omitted.]

"[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that *the party seeking review be himself among the injured.*" (Emphasis added.) *Sierra Club v. Morton*, 405 U.S. 727, 734 (1971).

C. Petitioner Evans Does Not Have Standing To Recover Damages Suffered By BSA

Article III jurisdiction cannot be invoked to redress the rights of absent third parties. "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . . '" *Warth v. Seldin*, 422 U.S. 490, 505 (1975). (Low income plaintiffs who seek to invalidate a City's restrictive zoning provisions have no standing because they cannot show that they themselves were excluded or their rights were violated.). *See also Bender v. Williamsport Area School District*, 475 U.S. 531, 534 (1985). ("We concluded that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.")

In other words, Evans " . . . has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167 (1972) citing *Virginian R. Co. v. System Federation*, 300 U.S. 515, 558 (1937); *Erie R. Co. v. Williams*, 233 U.S. 685, 697 (1914).

As the City explained earlier in its Statement of the Case, the City Marina subsidy for six berths, two storage spaces and a locker free of charge were provided to BSA, Mount Diablo Council, the California nonprofit corporation that oversees BSA's programs within its geographical area, including Berkeley. F-1-2; *Curran v. Mount Diablo*

Silverado Council, 17 Cal.4th 670, 678 (1998). The challenged City action at issue is the City Council's termination of the BSA subsidy. The damages sought in the complaint are to the BSA sea-scouting program for loss of the subsidized six berths, storage lockers and dry dock space and related impacts on the sea scouting program, which cannot be recovered by any individual program participant or scout leader.

Under the third prong of the standing test enumerated in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. at 102-04, that of redressability, Petitioner must show a likelihood the requested relief will redress the alleged injury. While the requested damages might have redressed an injury in fact to BSA, it is not a party. Evans cannot and does not purport to sue on BSA's behalf. Conversely, the relief he seeks does not address an injury to him nor does his complaint pray for injuries to him personally but to the Berkley sea-scouting program of BSA, an absent party. Thus, Evans himself simply does not have Article III standing to pursue this action for damages suffered by BSA.[1]

According to the Petition, Evans was "duly authorized to bring this action in a representative capacity on behalf of the other Sea Scout Program participants past and future." Petition pp. 2-3. In the FAC, Evans alleges that

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[1] Indeed, under California law, even a member of a nonprofit corporation is prohibited from instituting or maintaining an action in the right of the corporation, unless the action is a derivative suit. (*Gantmann v. Union Pacific Insurance Company*, 232 Cal.App.3d 1560, 1567 (1991); 284 Cal. Rptr 188, *citing* California Corp. Code § 7710.) Evans has not even alleged that he is a member of the Mount Diablo corporation but merely an adult "program participant" in its chartered Berkeley sea scouting program. FAC ¶ 11, D-6, 7.

the sea-scouting program has no organizational structure and "simply meet and have met *informally*." "*Anyone* is permitted to attend meetings and have their opinions heard at such meetings. . . . Any action to be taken is discussed by persons attending the meetings." (Emphasis supplied.) FAC ¶ 11, D-4-5. Petitioner does not allege any facts as to how this *ad hoc*, informal gathering, whose composition varies from meeting to meeting, based upon "anyone" who attends that day, can "duly authorize" Evans or anyone else to obtain damages on behalf of all sea-scouting participants, past and future, for damages incurred to a BSA program operated by its regional arm, a California nonprofit corporation. More importantly, he does not explain how any participant, including Evans, would individually have the right to recover damages for 100 years of rental fees for six berths and the like prayed for in the complaint, since the FAC acknowledges throughout that the alleged damage is to BSA's sea scouting program, and not to any individual.

In addition, Petitioner has failed to demonstrate an "injury in fact" to him rather than to BSA, under either the Equal Protection clause or the First Amendment caused by the City's nondiscrimination policy since he admits to sharing the City's viewpoint favoring the inclusion of gays and atheists in City-funded programs. App. A-17. Indeed, Evans alleges that he has actively thwarted BSA's policies for years by admitting both gays and atheists. App. D-24-25.

Accordingly, Evans lacks standing and cannot assert the rights of an absent third party as noted in *Warth v. Seldin*, *supra*, 422 U.S. at 499 and *Bender v. Williamsport Area School District*, 475 U.S. 531, 534.

II. PETITIONER MISSTATES THE FACTS

The Petition is replete with misstatements of fact or material omissions. For example, the Petitioner frequently cites to the California Supreme Court's opinion when the Court was merely reciting Petitioner's legal arguments or sections of its complaint. Yet, Petitioner fails utterly to provide the Court's factual analysis and rejection of those claims based upon all the judicially noticed facts in the record, such as the undisputed legislative record. Although it is axiomatic that this Court's review under Rule 10 cannot be predicated on deciding disputed facts, this is particularly true when the Petition for a Writ of Certiorari seeks to review the decision of the highest State court, since this Court has no supervisory power over such a court under 28 U.S.C. § 1257(a).

A. The California Supreme Court's Procedural Determinations As To Judicially Noticed Facts Deemed True Are Not Subject to Review By The United States Supreme Court

"It is beyond dispute" that the United States Supreme Court does not "hold a supervisory power over the courts of the several States." *Dickerson v. United States*, 530 U.S. 428, 438 (2000) *citing Smith v. Phillips*, 455 U.S. 209, 221 (1982). The Supreme Court's authority is limited to enforcing the dictates of the United States Constitution. *Dickerson v. United States*, 530 U.S. at 438, *citing Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991). Federal courts may not impose procedural requirements in state courts. *Dickerson v. United States*, 530 U.S. 438, *citing Harris v. Rivera*, 454 U.S. 339, 344-45 (1991).

In *Smith v. Phillips*, 455 U.S. 209, 221, a prisoner was granted a new trial on a writ of federal habeas corpus because of prosecutorial and juror misconduct. *Id.* at 211-14. In reversing the federal habeas remedy the Court stated, "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. [citations omitted]. No such wrong was present here." Similarly, in *Sanchez-Llamas v. Oregon*, 2006 WL 1749688 (June 28, 2006), the Supreme Court rejected petitioner's claim that the Court had the power to impose the remedy of suppression of evidence on the state court for violations of the consular notification requirement of the Vienna Convention. Relying on *Dickerson* and *Smith*, the Court noted that the Supreme Court has no supervisory authority over state-court proceedings and did not have the power to "direct Oregon courts to exclude Sanchez-Llamas' statements from his criminal trial." *Id.* at 8.

Thus, while this Court applies its independent judgment to weighing the facts in drawing its conclusions of law on federal constitutional questions, it is bound by the California Supreme Court's determination of the facts that must be deemed admitted in this case, since that conclusion is a matter of procedural California law, over which this Court has no supervisory authority.

B. Petitioner Makes Material Misstatements

Petitioner makes material misstatements of fact that are contradicted by his own admissions to the courts in these proceedings.

1. Petitioner Repeatedly Differentiates Between The Sea Scouts And BSA Even Though He Conceded To The California Supreme Court That They Are One And The Same

Evans' most glaring misstatement is his repeated differentiation between the "Sea Scouts" and the "Boy Scouts" as though they are distinct organizations and his claim that the City penalized the Sea Scouts because of their "association with the Boy Scouts". *See, e.g.*, Petition pp. i, 6, 7, 9, 15, 18, 19-20, 28. Petitioner's counsel conceded before the California Supreme Court that the Sea Scouts and BSA were "one and the same" with respect to discrimination. "We are bound by what the Boy Scouts tell us we have to do." The Court then stated: "We accept these concessions by plaintiffs as establishing, even as against any contrary allegation or implication of the complaint, that the Sea Scouts could not, consistent with the limitations imposed on them, truthfully state they would not in the future discriminate against openly gay or atheist participants." App. A-20. Thus, Evans conceded that the BSA sea-scouting program simply did not and could not make the written assurances of nondiscrimination that the City's Marina policy required.

2. The City Exercised Its Discretionary Budgetary Authority To Fund Particular Programs To Provide Services To The Public; It Did Not Create A "Generally Available Benefit"

Beginning with the "Questions Presented" section of his Petition and repeatedly throughout the Petition, Evans describes the berthing subsidy as a "generally available

benefit." This is highly misleading. BSA was the only group receiving a subsidy from 1945 until 1998. App. E, F, G, H. The subsidy was eventually extended to fund only three other programs for the public at the Berkeley Marina. App. J. The City Council was engaged in the exercise of classically discretionary spending authority in the same manner as any other level of government. Discretionary funding programs are not a "generally available benefit." Unquestionably, the decision as to what services or programs will best serve citizens and how such programs should be structured is vested in the City Council as the people's elected representatives. The Council could not lawfully delegate its authority to decide how and on what terms public funds should be allocated to every private supplicant who seeks public funds. The City Council merely exercised its discretion to fund and structure a program to provide services to the public. It conditioned the service to ensure that it would be available to all intended beneficiaries without discrimination.

3. The BSA Sea-Scouting Program Was The Only Subsidy Applicant That Failed To Comply With The Marina Resolution

Evans claims that "no other subsidy applicant was required to submit a letter" such as the April 8, 1998 letter. Petition p. 19. This statement flatly contradicts Evans' lawyer's concession to the trial court, by which he is bound, that the other organizations "*were able to say* that they would not discriminate on the basis of sexual orientation" while "the Sea Scouts because of their association with the Boy Scouts could not say . . . we do not discriminate on the basis of sexual orientation." April 30,

2001 Reporter's Transcript, p. 29 4-7, 16-22, App. I-2. As the California Supreme Court noted in its opinion, admissions of counsel during these proceedings are binding and deemed admitted facts under California law. *See* App. A-20-21.

4. The Waterfront Commission's Recommendation To Continue The Subsidy Was Only Advisory To The City Council, Who Rejected It

The City's Waterfront Commission tried to help the sea scouts continue to receive the subsidy when it became apparent that BSA's Mount Diablo Council would not allow the sea-scouting program to provide reasonable written assurances that it would not discriminate against atheists and on the basis of sexual orientation, as required by the Marina Resolution. App. I. The Commission recommended to the Council that the subsidy be continued for a one-year grace period as long as the scouts agreed to bring their policies into conformance with the City's Marina nondiscrimination policy within that grace period. App. L.

Evans has doggedly maintained that the Commission's essentially benign but *rejected recommendation* to the City Council, constituted compelled speech. Petition p. 15. The California Supreme Court responded to this claim by pointing out the obvious – that the City Council *rejected* the Waterfront Commission's recommendation to continue and condition the subsidy. A-19. The Council instead voted to deny the subsidy "due to BSA's policy of discrimination against gays and atheists." App. A-6. Citing to its complaint at D-21, D-23 and D-24. Evans responds thus "the Sea Scouts had already been required to comply with the

Waterfront Commission's demands as a condition of its recommendation." Petition p. 15. The cited sections of Evans' complaint establish no such thing and appear to be irrelevant to this issue.

As the City next explains, it is Evans' misstatement of these facts as well as his mischaracterization of this Court's opinions and the California Supreme Court's analysis of them that give rise to his contention that the unanimous California Supreme Court decision conflicts with this Court's precedents.

III. THE CALIFORNIA SUPREME COURT THOROUGHLY AND CORRECTLY ANALYZED AND APPLIED EACH CASE CITED BY EVANS; IT REJECTED EVANS' CLAIMS BASED ON THE FACTS

Evans cites a potpourri of inapposite First Amendment cases concerning the conditioning of government employment or contracts on the basis of political patronage, content or viewpoint based restrictions on speech in a public forum, government compulsion of private speech and the invalidity of laws which required the inclusion of unwanted members in private clubs *if* their inclusion would interfere with the club's message. Nothing in the California Supreme Court's holding in this case has any bearing on any of these cases or principles let alone provides any basis to erode their holdings in any manner.

Quite to the contrary, the imposition of nondiscrimination conditions on publicly-subsidized benefits ensures that the individual beneficiary of the government-subsidized program is protected from coercive demands by the government contractor for political, religious or other

fealty. The whole point of the Marina funding condition is to *prevent* political patronage or any other coercively imposed views on members of the public who may wish to avail their children and themselves of the subsidized recreational and educational programs about boating and San Francisco Bay at the Berkeley Marina.

As the City's description of the facts above attest, this case is about a routine and modest government action. In a classic exercise of the budgetary spending power, the City funded a handful of water related programs at the Berkeley Marina *for the entire public*. Its Marina nondiscrimination policy merely ensured that all members of the public had access to the programs that the City funded. It is unclear how ensuring that all youth could enroll in these programs about boating and the ocean, without discrimination, adversely impacted anyone's free speech or association. In any event, the government has no obligation, under the First Amendment, to fund any particular programs except those it decides serves the government's policies.[2]

A. The California Supreme Court's Decision Is Consistent With This Court's Decision On The Right of Expressive Association And Viewpoint Discrimination; The City's Policy Supports and Does Not Burden Evans' Viewpoint Since He Favors The Inclusion of Gays and Atheists In Sea-Scouting

Evans claims that the California Supreme Court decision is in conflict with this Court's decisions on freedom

[2] At pages 7-8 of his Petition, Evans makes gratuitous references to 20 U.S.C. § 7905, 42 U.S.C. § 5309 and sections of the California Government and Revenue and Taxation Codes. None of the cited sections have ever been at issue in this case before any court, including the California Supreme Court. Evans' reference to them is improper and should be disregarded.

of association and viewpoint discrimination. However, he has no standing to raise the issue since his own support for the inclusion of gays and atheists is consonant with the City's nondiscrimination policy.

The California Supreme Court noted that, Evans and the other petitioners below "disavow both in their complaint and in their briefs in [the California Supreme Court] any desire to discriminate on the basis of sexual orientation or religion. They therefore cannot, and do not, claim that Berkeley, by requiring them to refrain from such discrimination is restricting their membership for purposes of expressive association." App. A-17. Indeed, Evans' complaint alleges that the sea-scouting program has always included gays and atheists, in apparent flagrant violation of BSA dictates. Thus, Evans has no standing to claim that *his* rights of expressive association have been burdened by the City's nondiscrimination policy.

The California Supreme Court's understanding of the scope of the right of expressive association was taken directly from this Court's holding in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the lead case cited by Evans. *See* Petition p. 6. "The forced inclusion of an *unwanted person* in a group infringes the group's freedom of association *if* the presence of that person affects in a significant way the group's ability to advocate public or private *viewpoints*." (Emphasis supplied.) *Boy Scouts of America v. Dale*, 530 U.S. 647-48. Since Evans' viewpoint supports the inclusion of gays and atheists in sea-scouting, such members are neither "unwanted" nor does their inclusion under the Marina policy have any adverse effect on Evans' "ability to advocate a public or private viewpoint." *Id.* Indeed, it advances his viewpoint. Thus, Evans has stated

no claim for violation of *his* rights of expressive association.

Similarly, as a threshold *factual matter* the Marina policy cannot be said to adversely affect *Evans' viewpoint* in any way. Thus, he has no standing to charge viewpoint discrimination either. Indeed, even a claim of compelled-speech requires interference with the claimant's message. "The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v. Forum for Academic & Institutional Rights*, ___ U.S. ___, 126 S.Ct. 1297, 1309 (2006).

The California Supreme Court nonetheless considered and rejected Evans' viewpoint discrimination argument after carefully analyzing all this Court's cases concerning funding subsidies. Evans lost this issue on the facts and not on any inadequate legal analysis by the California Supreme Court.

B. The California Supreme Court's Decision Is Consistent With This Court's Decisions Concerning Conditions On Government-Funding – The City Has Wide Latitude To Tailor Its Publicly-Funded Programs

The central fallacy of Evans' argument is to equate the First Amendment's restrictions on laws regulating expression with an absolute constitutional duty on the part of a state or local government to finance discriminatory clubs at taxpayer expense. During oral argument in the California Supreme Court, Evans' attorney admitted that, under his argument, the City would have a

constitutional duty to fund a youth boating program operated by the Ku Klux Klan or violate the Klan's associational rights.

Not only has this Court and the Circuit Courts taken no such position, this Court has indicated quite the contrary. In *Locke v. Davy*, 540 U.S. 712, 720-21 (2004), the Court upheld the Washington state constitution's prohibition on the funding of religious scholarships noting the claimed disfavor of religion "imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. *The State has merely chosen not to fund a distinct category of instruction*" (Citations omitted.) (Emphasis added).

The important distinction between achieving policy objectives through financial incentives rather than statutory coercion was also noted in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 669 (2004). The Court invalidated a statutory mandate to undertake internet filtering of matter harmful to minors in light of the availability of other less restrictive alternatives such as requiring such filters to be installed as a condition of public library funding which it had previously upheld in *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).) "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objective. . . . " *United States v. Am. Library Ass'n*, 539 U.S. at 202.

The California Supreme Court found this Court's holding in *Grove City College v. Bell*, 465 U.S. 555 (1984)

to be virtually dispositive. App. A-11 "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that the educational institutions are not obligated to accept." *Id.* at 575. "Requiring *Grove City* to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the program infringes no First Amendment rights of the College or its students." *Id.* at 575-76.

The First Amendment does not guarantee a right to government funding of private speech. *See, e.g., Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) (upholding denial of charitable exemptions to organizations attempting to influence legislation); *Cammarano v. United States*, 358 U.S. 498 (1959) (upholding treasury regulation that denied business expenses deductions for lobbying activities. "Congress has merely refused to pay for lobbying out of public monies. This Court has never held that the Court must grant a benefit such as [the plaintiff] claims here to a person exercising a constitutional right." *Id.*

Government funding conditions restricting speech have been invalidated when the goal of the funding program was to facilitate private speech. *Legal Services Corporation v. Velasquez*, 531 U.S. 533 (2001). Similarly, viewpoint discrimination is invalid when the government creates a public forum to encourage a diversity of views from private speakers. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Evans conceded during oral argument before the California Supreme Court that the City's funding of a handful of recreational programs at

the Marina did not create a public forum and that the sea-scouting program was not speech.[3]

Finally, it is improper to condition a government benefit on the benefited individual giving up an unrelated protected right. *See, e.g., Speiser v. Randall* 357 U.S. 513 (1958) (invalidating a prohibition on advocating the forcible overthrow of the government as a condition of tax-exempt benefits). Here, the City's Marina nondiscrimination policy was designed to prevent just such a coerced waiver of constitutional rights.[4]

Interestingly, the California Supreme Court takes a more restrictive approach to the review of government funding conditions under the California Constitution than required under the United States Constitution. *Compare Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 265, 625 P.2d 779, 172 Cal.Rptr. 866 (1981) *with Rust v. Sullivan*, 500 U.S. 173 (1991). The California Constitution's heightened scrutiny of such conditions requires that the funding conditions be germane to the funded purpose and not attempt to regulate behavior outside the funded program. Applying even these more

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[3] Evans' claim, at pp. 23-25 of his Petition, that the California Supreme Court's decision conflicts with circuit court cases forbidding viewpoint discrimination in a public forum is belied by his own admission that the fee waiver did not create a public forum, boating is not speech, and his viewpoint supports the inclusion of gays and atheists in sea-scouting.

[4] This Court's recent decision in *Rumsfeld v. Forum for Academic Institutional Rights, supra* 126 S.Ct. 1297, upheld a First Amendment compelled speech challenge to the Solomon amendment, 10 U.S.C. § 983 under the war powers clause, Article I, Section 8, cl. 1 of the United States Constitution. Respondent City thus treats this holding as inapposite for this reason except to the extent it recites prior principles enunciated by the Court, which the City cited earlier in this brief.

restrictive standards, the Court concluded, *on the facts of this case*, that Berkeley merely required reasonable written assurances that it would not exclude members of the public otherwise eligible for the program on any of the prohibited bases listed in the Marina resolution. The Marina resolution did not regulate any behavior outside the program or of individual participants. App. A-15-16.

Evans actually concedes that a funding condition is permissible "when the government institutes a program or subsidy as an instrument of its own message or to perform governmental functions." Petition p. 13. The City's Marina policy of nondiscrimination was very much the City's own speech and message to the extent that it implicated speech at all. Certainly, the creation of recreational programs by fee waiver at the Berkeley Marina is a governmental function, otherwise, the fee waivers would have constituted an unlawful gift of public funds. Thus, under Evans' own formulation of the legal standards, the California Supreme Court's decision was consistent with this Court's decisions.

It is actually Evans who seeks to get around this Court's clear precedent by making the startling observation that budgetary discretion only applies to Congress' exercise of the Spending Power. Petition p. 12. This novel proposition not only stands federalism on its head, but also runs directly contrary to the plain language of this Court's recent unanimous decision in *DaimlerChrysler Corp. v. Cuno*, *supra*, 126 S.Ct. at 1863: "State policymakers, no less than their federal counterparts retain broad discretion to make 'policy decisions' concerning state spending 'in different ways . . . depending on their perceptions of wise fiscal policy and myriad other circumstances.'"

At the very heart of the First Amendment's protection of speech, association and expression is the right of elective franchise. It seeks to ensure that voters will have the opportunity to elect officials whose views on the propriety of particular expenditures and policies are consistent with their own. This is the very essence of representative government. The mere fact that these officials believe some public expenditures and policies to be sound and others to be wrongheaded, transgresses no First Amendment constraint. Quite to the contrary, it advances the First Amendment's core democratic right of elective franchise and representative government.

Justice Scalia put it well in his concurring opinion in *National Endowment of the Arts v. Finley*, 524 U.S. 569, 598 (1998):

> It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects – which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary. . . . None of this has anything to do with abridging anyone's speech.

C. Evans' Remaining Attacks On The California Supreme Court Decision Turn On Factual Misstatements

The rest of Evans' arguments are merely distortions of fact. For example, Evans' compelled speech claim rests entirely on the *false factual premise* that the Waterfront Commission's *recommendation* to give the sea-scouting program a one-year grace period was compelled speech even though the City Council rejected it. Petition p. 13-15.

The California Supreme Court pointed out this factual fallacy in Evans' legal argument. *See*, App. A-18-19. Evans claimed that he had already been required to comply with the Waterfront Commission's decision but cites to portions of the record that state no such thing. *See* City's discussion of Evans' misstatements of fact, *supra* at p.17.

Finally, Evans claims that the City did not act neutrally and singled it out. Petition pp. 18-19. However the undisputed legislative record belies this claim. BSA received favorable and exclusive subsidies for decades. The Marina resolution was adopted because other entities wanted to receive support for their community programs. Evans' attorney conceded that the other subsidy recipients supplied reasonable assurances that they would not discriminate on the requested bases whereas the sea-scouting program could not because it was bound by BSA discriminatory policies against gays and atheists. Once again, the California Supreme Court's rejection of Evans' argument turned on these facts and not on the California Supreme Court's misstatement of law.

In short, the California Supreme Court's opinion carefully considered every principle and case advanced by Evans in this Court in urging the granting of certiorari. It rejected his arguments based upon the facts in this case and not as a result of any legal error in conflict with decisions of this Court, the circuit courts or the courts of other States.

CONCLUSION

The writ should be denied both because this Court lacks jurisdiction and because there are no compelling reasons under Supreme Court Rule 10 that would warrant this Court's grant of a writ of certiorari.

Respectfully submitted,

Manuela Albuquerque, City Attorney
Counsel of Record
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
(510) 981-6950

Counsel for Respondent
City of Berkeley

APPENDIX E

RESOLUTION NO. 27,738-N.S.

AUTHORIZING THE BOY SCOUTS OF AMERICA TO USE CERTAIN BERTH AND MOORING FACILITIES IN THE BERKELEY YACHT HARBOR.

BE IT RESOLVED by the Council of the City of Berkeley as follows:

WHEREAS, the Boy Scouts of America have filed a request for the use without charge of one open berth and mooring facilities for seven boats in the Berkeley Yacht Harbor; and

WHEREAS, Section 5.1 of Resolution No. 23,605-N.S. provides for the granting by the City Council of the use of berth and mooring facilities in the Berkeley Yacht Harbor without charge, under such terms and conditions as said Council sees fit to impose.

NOW, THEREFORE, Be it resolved that the Boy Scouts of America are hereby granted the use without charge of one berth and mooring facilities for seven boats to be designated by the Harbormaster.

RESOLVED FURTHER, that said berth and mooring facilities shall be used by the Boy Scouts of America in accordance with all rules and regulations established by the City of Berkeley relative to the Berkeley Yacht Harbor, and said permission herein granted is subject to revocation by a 30 day written notice.

Approved as to form:

/s/ Fred C. Hutchinson
City Attorney

APPENDIX F

RESOLUTION NO. 42,885-N.S.

GRANTING A PERMIT TO THE BOY SCOUTS OF AMERICA, MT. DIABLO COUNCIL, FOR USE BY THE SEA SCOUTS OF SIX BERTHS, TWO DRY STORAGE SPACES AND ONE DOCK LOCKER WITHOUT CHARGE AT THE BERKELEY MARINA, UNDER CERTAIN TERMS AND CONDITIONS, AND RESCINDING RESOLUTION NO. 27,738-N.S.

BE IT RESOLVED by the Council of the City of Berkeley as follows:

WHEREAS, the Boy Scouts of America, Mt. Diablo Council, has requested permission for the use by the Sea Scouts of six (6) berths, two (2) dry storage spaces and one (1) dock locker, without charge, at the Berkeley Marina.

NOW, THEREFORE, Be it Resolved that a permit is hereby granted to the Boy Scouts of America, Mt. Diablo Council, for the use by the Sea Scouts of six (6) berths, two (2) dry storage spaces and one (1) dock locker, without charge, at the Berkeley Marina for the berthing of boats, to the extent such facilities are available, under the following terms and conditions:

1. The berths, dry land storage spaces and the dock locker to be used by the permittee shall be designated by the Marina Superintendent.

2. In the event all berths so designated are not used by the permittee, the unused berths may be assigned and rented to others during the period they are not used by the permittee.

3. In the event the permittee desires the use of additional berths, dry land storage spaces or dock lockers, permittee shall pay City at the applicable rates fixed therefor.

4. Permittee shall pay all costs of utilities and shall comply with all rules and regulations applicable to the Berkeley Marina.

5. The permit granted herein shall not be transferred or assigned.

6. The City of Berkeley reserves the right to revoke this permit at any time upon thirty (30) days written notice by the City Manager of City to permittee.

7. Permittee agrees that it will not refuse membership in its organization to any person on account of race, creed, color, national origin or ancestry, provided such person is otherwise qualified for membership, and further agrees that it will not discriminate against any person on account of race, creed, color, national origin or ancestry in the use of the facilities permitted by this resolution.

8. The permittee shall file with the City Clerk of the City of Berkeley a letter or signed copy of this resolution agreeing to be bound by the terms and conditions imposed by this resolution.

FURTHER, RESOLVED, that Resolution No. 27,738-N.S. be and it is hereby rescinded.

Approved as to form:

/s/ Robert T. Anderson
Assistant City Attorney

Copies sent 3/3/69
To: Boy Scouts of America
Recreation
Marina
Treasurer

RESOLUTION

No 42,885 N.S.

Dated: January 28, 1969

Adopted by the Council of the City of Berkeley by the following vote:

yes: Councilmen Brown, DeBonis, Dellums, Dewey, May, Sweeney, Swingle and President Johnson.
Noes: None.
Absent: Councilman Gordon.

/s/ Wallace J.S. Johnson
Mayor and President of the Council

Attest /s/ Edythe Campbell
City Clerk and Clerk of the Council

APPENDIX G

City of Berkeley

City Manager's Office
Martin Luther King Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

TEL: (510) 644 6580
FAX: (510) 644 6035

E-MAIL: *manager@ci.berkeley.ca.us*

[LOGO]

COUNCIL ACTION
March 4, 1997
CR# 96-003

To: Honorable Mayor and
Members of the City Council

From: James Keene, City Manager

Subject: POLICY FOR USE OF MARINA BERTHS BY NON-PROFIT ORGANIZATIONS PROVIDING COMMUNITY SERVICE

RECOMMENDATION

That the City Council adopt a resolution approving a policy which provides berth space at the Berkeley Marina to non-profit organizations in exchange for services which benefit the community.

BACKGROUND

At its November 19, 1996 meeting, the Council referred a proposed policy back to the Waterfront Commission and the City Manager and requested a further review of the community service requirement and a diversity statement.

Staff discussed these issues with the Waterfront Commission on December 11, 1996. The attached resolution includes the Commission's recommendations which staff agrees are both practical and reasonable. The Commission approved the attached policy with a vote of 6-0-0 with three members absent. In favor: Commissioners Hobel, Frangos, Kawczynska, Smith, Wolgast and Wasson.

Current Status

The purpose of the policy is to establish criteria to evaluate non-profits who desire to receive berth space in exchange for providing community services. In the past, such requests by non-profits have been presented to the Council without any guidelines or criteria to determine if the loss in revenue would equate with the level of community service/benefit provided by the respective non-profit.

At this time, the Sea Scouts is the only group receiving berth space as compensation for community service. The Nautilus Society (an education group and operator of the *Pegasus*) and Dr. Robert Schmeider (who frequently takes local children on Bay trips on the *Cordell Explorer*), have requested a similar arrangement.

The attached resolution is different from the one presented to the Council in November, 1996 in that it more accurately reflects the Waterfront Commission's desire to encourage broader use of the Marina by traditionally under-represented users. In addition, the Commission recommends that providing berth spaces in exchange for community service should be approved by the Council on a case-by-case basis, after evaluating the level of community benefit.

FINANCIAL IMPA

Adoption of this policy may result in less revenue to the Marina fund. This impact is difficult to estimate because it depends on the number of applicants, future recommendations of the Waterfront Commission, and Council action.

For example, the approximate annual value of the four berths allocated to the Sea Scout is $21,900. The berth spaces for the *Pegasus* and the *Cordell Explorer* are worth about $5,600 per annum. The total in-lieu value of these spaces is $27,500 each year.

CONTACT PERSON

Guy Thomas, Chair, Waterfront Commission	841-3438
Cliff Marchetti, Waterfront Manager	644-6943

Approved by:

/s/ John Alderson
John Alderson,
Director of Parks and
Waterfront

Attachment A: Proposed Resolution

cc: Waterfront Commission
John Alderson, Director of Parks and Waterfront
Cliff Marchetti, Waterfront Manager

APPENDIX H

RESOLUTION NO. 58,859 – N.S.

ADOPTING A POLICY FOR THE USE OF BERTHS AT THE BERKELEY MARINA BY NON-PROFIT ORGANIZATIONS PROVIDING COMMUNITY SERVICES

WHEREAS, a number of non-profit organizations wish to occupy berths at the Berkeley Marina in exchange for community service; and

WHEREAS, the Waterfront Commission and the City Council have reviewed this issue.

NOW THEREFORE, BE IT RESOLVED that the City Council of the City of Berkeley hereby establishes the following policy for the use of the berths at the Berkeley Marina by non-profit organizations which provide community service:

A. QUALIFYING ORGANIZATIONS: MINIMUM REQUIREMENTS

1. Only those organizations which meet the following criteria shall be eligible to receive berth spaces in exchange for community service:

a. The purpose of the organization is to supply a beneficial public service.

b. The organization must conduct an activity on a regular and on-going basis.

c. The organization must clearly demonstrate that its presence in the Marina or its service to the community, as evidenced by the cost/benefit analysis provided by the non-profit, greatly exceeds the value of the berth.

d. The organization must provide a service not duplicated by a private business operator.

2. Only those organizations which demonstrate that they promote cultural and ethnic diversity, as evidenced by the following criteria, shall be eligible for consideration:

a. Membership policy and practices.
b. Recruitment strategy.
c. Outreach to under-represented populations.
d. Mission statement, if any.

The Berkeley Marina advocates and practices equal opportunity in terms of access to its berthing facilities. Availability and use of the facilities will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition.

B. APPLICATION PROCEDURE

1. Non-profit applicants for berths at the Berkeley Marina must make written application to the Waterfront Manager stipulating the following:

a. Name and address of organization
b. Name, address & telephone number of person responsible for business affairs of the group.
c. Type of organization
d. Number of members of organization
e. Level of participation of members
f. Age-level of members of organization and/or participants
g. Contribution to community including hours of service (if applicable) and activities
h. Reason and justification for request
i. Time period/duration for use of Marina (indefinite or specific time period)

j. Copy of bylaws (if any)
k. List of completed and planned community projects
l. Financial statement for prior year

2. The Waterfront Commission shall review the application and make a recommendation to the Council that the provision of community services warrants berthing compensation commensurate with the public benefit.

C. REPORTING REQUIREMENTS, COMPLIANCE, AND ADMINISTRATION

1. All organizations which receive berthing space compensation in consideration for community services at the Berkeley Marina must comply with the following provisions:

a. On February 1 of each year, each organization must submit a report to the Waterfront Manager detailing the organization's community service for the prior calendar year, including the following:

1) Number of members of the organization and/or level of participation.
2) Number and type of community activities.
3) Number of persons participating in each activity both from the membership and from the community, if different.
4) Plans for the upcoming year for community service.

b. On February 1 of each year, each organization must submit a financial statement for the prior calendar year to the Waterfront Manager.

c. No later than the February meeting of the Waterfront Commission, or at its next meeting in the event there is no February meeting, each organization must

appear before the Waterfront Commission and describe its activities in the prior calendar year, as described in this section.

d. On August 1 of each year, each organization must submit to the Waterfront Manager a semi-annual report containing the information described herein for the first six months of the calendar year.

e. Any organization failing to provide the prescribed information and reports by the listed deadlines will be required to pay the normal fee charged for its berth or remove its vessel or material from the Marina within thirty (30) days notice by the Waterfront Manager.

2. Organizations which comply with the requirements of this policy and other applicable City ordinances and/or policies shall have any applicable berthing compensation renewed annually by the Council after a review and recommendation by the Waterfront Commission.

3. When the owner of private vessel requests a berth which is occupied by a vessel owned by a non-profit organization receiving berthing compensation for community services, the Waterfront Manager may require, with thirty (30) days advance notice, the vessel owned by the non-profit organization to move to another berth.

The foregoing Resolution was adopted by the Berkeley City Council on March 4, 1997, by the following vote:

Ayes: Councilmembers Armstrong, Breland, Maio, Olds, Shirek, Spring, Woolley, Worthington and President Dean.

Noes: None.

Absent: None.

/s/ Shirley Dean
Shirley Dean
Mayor and President
of the Council

Attest: /s/ Sherry Kelly
Sherry M. Kelly
City Clerk and Clerk
of the Council

APPENDIX I

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT

EUGENE EVANS, ET AL.,
PLAINTIFFS,

VS. NO. 809180-4

CITY OF BERKELEY, ET AL.,
DEFENDANT. /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APRIL 30, 2001

FROM FINAL JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

FOR THE PLAINTIFFS:

FOR THE DEFENDANTS:

* * *

[29] THE DIFFERENTIAL TREATMENT HERE IS THAT THE CALIFORNIA SAILING CLUB AND THE NAUTILUS CLUB WERE ENTITLED TO STAY AND GET THE PREFERENCES FOR THE FREE BERTHS BECAUSE THEY WERE ABLE TO SAY THAT THEY WOULD NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION AND THEY WERE ABLE TO STAY FREE BECAUSE THEY'RE NOT ASSOCIATED WITH THE BOY SCOUTS. THAT CONSTITUTES A BARRIER.

THE BARRIER UNDER THE NORTHEASTERN FLORIDA, ET CETERA VERSUS CITY OF JACKSONVILLE SAID THAT:

> "ANY TIME A GOVERNMENT ERECTS A BARRIER THAT MAKES IT MORE DIFFICULT FOR ONE GROUP TO OBTAIN A BENEFIT THAN MEMBERS OF ANOTHER GROUP, THE INJURY IS THE DENIAL OF EQUAL TREATMENT AND IT'S A VIOLATION OF EQUAL PROTECTION."

THAT BARRIER HERE WAS THAT THE SEA SCOUTS, BECAUSE OF THEIR ASSOCIATION WITH THE BOY SCOUTS, COULD NOT SAY THE PRECISE WORDS THAT THE CITY ASKED FOR, WHICH WAS "WE DO NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION." WHAT THEY DID SAY WAS THAT "WE WILL OBEY THE LAWS THAT FORBID DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION."

THEY TRIED TO REACH A NEGOTIATION WITH THE CITY ON THAT AND TRIED TO COMPROMISE IT, OBVIOUSLY, TO OBTAIN WHAT THE CITY WANTED. NONE OF THE OTHER PERSONS OR ENTITIES THAT APPLIED FOR THE FREE BERTHS WERE SUBJECT TO THAT KIND OF SITUATION OR THAT KIND OF TREATMENT.

THE COURT: YOU TOLD ME THAT THEY DID SIGN OFF ON

* * *

APPENDIX J

City of Berkeley

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Martin Luther King Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

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[LOGO]

FOR COUNCIL ACTION
May 5, 1998

Date: May 4, 1998

TO: Honorable Mayor and
Members of the City Council

FROM: James Keene, City Manager

Subject: SUPPLEMENTAL REPORT REGARDING MARINA FREE BERTHS

RECOMMENDATION

That the Council deny free berths to the Berkeley Sea Scouts.

BACKGROUND

Attached for your information is a copy of the City Attorney's opinion concluding that the provision of free berths to the Berkeley Sea Scouts violates the City Council's March 4, 1997 resolution and B.M.C. section 13.28.060. For this reason, I recommend against approving such free berths.

Attachment

Approved:

/s/ Manuela Albuquerque
City Attorney

CITY OF BERKELEY

Memorandum

DATE: May 4, 1998

TO: JAMES KEENE, City Manager

FROM: MANUELA ALBUQUERQUE, City Attorney

SUBJECT: LEGALITY OF FREE BERTHS TO ORGANIZATION AFFILIATED WITH THE BOY SCOUTS OF AMERICA

ISSUE

Does the April 8, 1998 letter from the Berkeley Sea Scouts constitute compliance with the City Council's March 4, 1997 resolution concerning the provision of free berths at the Marina and Berkeley Municipal Code section 13.28.060 subdivision 3.

CONCLUSION

No.

ANALYSIS

I. The March 4, 1997 Council Resolution

On March 4, 1997 the Berkeley City Council adopted a policy which authorized waiver of the Berkeley Marina berthing fee for community organizations which were deemed to provide community services. In addition to setting criteria for the services which must be provided, the Council resolution authorized waivers to those organizations which "demonstrate that they promote cultural and ethnic diversity,. . . . " The resolution required that this commitment to diversity be reflected in membership policies, recruitment strategy, outreach to under represented populations and mission statements, if any. This segment of the policy went on to provide that facilities were not to be predicated on a persons' race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition. Since that time, the Waterfront Commission which is charged with implementing the Council resolution, has been inquiring into charges that the Berkeley Sea Scouts ("Sea Scouts") fail to comply with the Council resolution, because of the claimed practices of the Boy Scouts ("Boy Scouts") with respect to sexual orientation and atheists.

II. Chapter 13.28 of the Berkeley Municipal Code (BMC)

Berkeley Municipal Code chapter 13.28 prohibits discrimination on the basis of sexual orientation in employment, housing, business establishments, City facilities and services and educational institutions. Section 13.28.030 prohibits discrimination in City services and facilities. In addition to prohibiting discrimination in such services and

facilities when provided by the City itself, the section also makes it unlawful for any person to engage in such discrimination with respect to any program which is funded in whole or in part by City funds. Thus, Berkeley Municipal Code section 13.28.060, as a whole, would preclude the provision of free berths to the Sea Scouts if they discriminate on the basis of sexual orientation.

III. Relevant Scout Policies

The Sea Scouts have stated that they do not discriminate on the basis of sexual orientation or against atheists. They have not been willing, however, to adopt a policy which states expressly that the Scouts will not discriminate on the basis of sexual orientation. They state that they are unwilling to do so due to fear of losing their charter from the Boy Scouts. They have instead sent the April 8, 1998 letter, which is appended to the Waterfront Commission report. It states that the Scouts consider sexual orientation to be a private matter and that they will comply with Berkeley Municipal Code section 13.28.060. The Sea Scouts' written policy also states that they do not discriminate on the basis of religion.

Opponents of free berths for the Scouts have claimed that the Sea Scouts are part of the Boys Scouts, and that the latter organization has explicit policies which discriminate against atheisis and homosexuals. Thus, I turn next to the relationship between the Sea Scouts and the Boy Scouts and the latter's policies with respect to atheists and sexual orientation.

IV. Relationship Between Berkeley Sea Scouts and Boy Scouts Of America; Boy Scout Policies Relating To Sexual Orientation And Atheists

Neither the report from the Waterfront Commission nor any information submitted to it actually contained copies of any Boy Scouts policies or any description of their relationship with the Berkeley Sea Scouts. The local representatives of the Sea Scouts were likewise unable to provide any information regarding the Boy Scouts' national policies. Karl Rowley, the representative of the Mount Diablo Silverado Council of the Boy Scouts stated that the Boy Scouts received its charter from Congress. He said the Boy Scouts in turn chartered councils, such as the Mount Diablo Silverado Council, for each geographical area. Each council oversees and passes on requests for charters by local groups, such as the Sea Scouts. Mr. Rowley stressed that membership in any local group is actually membership in the Boy Scouts. This principle was also confirmed by the outside counsel for the Boy Scouts in New York, to whom I was referred by its General Counsel.

The information about the Boy Scouts national policies was obtained from Carla Kerr of the New York offices of Hughes, Hubbard and Reed. Ms. Kerr is the Boy Scouts' counsel in the recent California Supreme Court case, of *Curran v. Mount Dabble Council of the Boy Scouts of America* 98 D.A.R. 2802 (March 24, 1998). In that case the Court noted that the Boy Scouts considered avowed homosexuality and Scouting to be incompatible, because of the Boy Scouts longstanding belief that homosexual conduct was immoral and thus incompatible with the Boy Scout oath to be "morally straight. Ms. Kerr confirmed that the footnotes in that case describing the Boy Scouts policies were accurate with respect to the Boy Scouts

current policies in this regard. Ms. Kerr also confirmed that the Boy Scouts considered atheism to be inconsistent with the Boy Scouts' oath that a scout's duty is to "God" and country. Although the Boy Scouts do not discriminate between religions they do require Scouts to believe in God.

Ms. Kerr also stated that any local group, which did not adhere to the national policy which requires exclusion/ expulsion of avowedly gay or lesbian or atheist members or adult leaders, would lose its charter. She also stated that a local group which invoked a local law which required it to include persons who were avowedly gay would not be exempt from this Boy Scouts policy.

For all these reasons I conclude that the Berkeley Sea Scouts do not qualify as an organization entitled to free berths under the city Council's policy prohibiting discrimination on the basis of sexual orientation and religion and indeed that the provision of free berths would violate B.M.C. section 13.38.060.

Respectfully submitted

/s/ Manuela Albuquerque
MANUELA ALBUQUERQUE

cc: Lisa Caronna

APPENDIX K

May 5, 1998 COUNCIL MINUTES

14. **Discontinued Use of Marina Berth by the Sea Scouts**
From: Councilmembers Worthington, Maio, and Breland
Recommendation: That Council overturn the decision of the Waterfront Commission to give the Sea Scouts continued free use of the marina berths due to their discriminatory policies against gays and atheists.
a. Waterfront Commission Report
Recommendation: Approve applications for free berths at the Berkeley Marina for one year for all Sea Scout vessels which meet the City's application criteria, provided that the letter from the Sea Scouts dated April 8, 1998 is distributed to all Boy Scout members and persons associated with the Berkeley Sea Scout Program; and further provided that the Sea Scouts initiate a dialogue with the Mt. Diablo Boy Scout Council on changing the Boy Scouts discriminatory policy.
b. Waterfront Commission Minority Opinion Report
c. City Manager Report
Recommendation: The City Manager takes no position on this matter pending review and advice by the City Attorney, who will be prepared to provide such advice at the May 5th Council meeting.
d. City Manager Supplemental Report
Recommendation: Do not approve free berths for Sea Scouts based on a City Attorney's Opinion that doing so would be in violation of the City Council's March 4, 1997 Resolution and Berkeley Municipal Code Section 13.28.060.

Actions: Removed from the Consent Calendar by Councilmember Worthington. Moved, seconded, carried (Woolley/Breland; Noes – Olds) to deny free

berths in the Marina to the Sea Scouts due to the Boys Scouts of America's discriminatory policies against gays and atheists.

An amendment to the motion by Worthington carried (Noes – Shirek; Abstain – Olds, Woolley) to applaud and commend the Berkeley Sea Scouts efforts to modify the Boy Scouts' policies of discrimination related to religion and sexual orientation; to express pride in the leadership provided by the Berkeley Sea Scouts in challenging the National Boy Scouts; to acknowledge the enormous contributions to the community by Skipper Sangman, William Brazil, Gene Evans and other community leaders; to encourage the Sea Scouts' efforts toward independence in exploring changing to the "Learning For Life Program"; to encourage voluntary private efforts, including efforts of Councilmembers and Commissioners, to help the Berkeley Sea Scouts pay for berthing space during the transition period.